

COURT OF APPEALS, STATE OF COLORADO

Case No. 91 CA 1723

BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE

TOWN OF FREDERICK,
a municipal corporation,

Appellant,

v.

NORTH AMERICAN RESOURCES COMPANY,
a Montana corporation,
CAZA DRILLING COMPANY, a
Colorado Corporation, and
TOM MONROE,

Appellees.

District Court Case No. 91 CV 556
Opinion By : The Honorable Jonathan W. Hays

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I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the District Court erred when it declared that Ordinance No. 152 of the Town of Frederick is void and unenforceable.

II. STATEMENT OF THE CASE

The Colorado Municipal League hereby adopts and fully incorporates by reference the statement of the case in the Brief submitted by Appellant Town of Frederick.

III. SUMMARY OF ARGUMENT

Some aspects of oil and gas regulation, as effected in Ordinance No. 152 of the Town of Frederick, involve municipal functions. Since article V, section 35 of the Colorado Constitution prohibits the delegation of power to perform municipal functions to a special commission, regulations of the Oil and Gas Conservation Commission cannot override the ordinance within the boundaries of the municipality.

IV. INTRODUCTION

Article V, section 35 of the Colorado Constitution provides:

The general assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever.

This provision prohibits the delegation by the Oil and Gas

Conservation Act ("OGCA") of municipal functions to the Oil and Gas Conservation Commission ("Commission"). No rule or regulation of the Commission can preempt any ordinance of a municipality which discharges municipal functions.¹ In order to supersede a municipal ordinance which accomplishes a municipal function, the General Assembly must act itself. It may not delegate this power.

V. ARGUMENT

1. Ordinance 152 of the Town of Frederick accomplishes municipal functions within the powers of a statutory municipality.

Municipal functions include at least that which is authorized by statute. Regulating certain aspects of the operation of an electric light plant by a municipality, for example, has been held to be the performance of a municipal function, "specifically authorized by statute." Town of Holyoke v. Smith, 75 Colo. 286, 226 P. 158, 160 (1924).

Frederick, as a statutory town, has power to perform municipal functions. Municipalities have express

¹ Ordinance 152 of the Town of Frederick sets forth its intent to provide for "sound environmental practices." Section 1.1. The ordinance requires each oil and/or gas well driller or operator to obtain a permit from the Town, after public hearing. Wells are not permitted within certain distances of building and property boundaries. The ordinance also contains general regulations relating to the drilling and operation of oil and/or gas wells.

administrative, financing, and general police powers. C.R.S. Sec. 31-15-201 to 31-15-401. Under C.R.S. Sec. 31-15-501, municipalities have powers to regulate businesses, including the power to "license, regulate, and tax, subject to any law of this state, any lawful occupation, business place, amusement, or place of amusements and to fix the amount, terms, and manner of issuing and revoking licenses issued therefor." C.R.S. Sec. 31-15-501(c).

Municipalities have numerous additional express powers, including authority to regulate and control certain aspects of railroad operations. 31-15-501(f). Of particular applicability in the context of oil and gas drilling and production are powers to regulate the "construction, repairs, and use of vaults, cisterns, areas, hydrants, pumps, sewers, and gutters", 31-15-601(1)(a); "prescribe the thickness and strength of, and the manner of constructing, stone, brick, and other buildings and to prescribe the construction of fire escapes therein", 31-15-601(1)(c); "prescribe the limits within which wooden buildings shall not be erected...", 31-15-601(1)(d); prevent the dangerous construction and condition of chimneys, fireplaces, hearths, stoves, stovepipes, ovens, and apparatus used in and about any factory...", 31-15-601(1)(e)(I); "regulate and prevent the carrying on of manufacturing which causes and promotes fires", 31-15-601(1)(e)(II); "regulate or prevent the storage and transportation of ... gasoline, nitroglycerine,

petroleum, or any of the products thereof, and other combustible or explosive material within the municipal limits and to prescribe the limits within which any such regulations shall apply"; and "regulate the use of lights in garages, shops and other places...." C.R.S. Sec. 13-15-601(1)(j).

Finally, C.R.S. Sec. 31-15-103 grants municipalities power to enact ordinances to discharge powers and duties "which are necessary and proper to provide for the safety, preserve the health, promote the prosperity, and improve the morals, order, comfort, and convenience of such municipality and the inhabitants thereof not inconsistent with the laws of this state." All of these powers have been conferred directly by the General Assembly.

"Regulation" is not inherently municipal or statewide in scope. Municipal functions are delimited by the corporate boundaries. Regulation of rates for utilities operating outside the limits of a municipality is not authorized by statute or otherwise and does not constitute a municipal function. Regulating municipally operated public utilities within the boundaries of the municipality, or purchasing, selling or building public utility facilities does constitute a municipal function. City of Loveland v. Public Utilities Commission, 195 Colo. 298, 580 P.2d 381 (1978), see also Union Rural Electric Association v. Town of Frederick, 670 P.2d 4 (1983). Regulation of oil and gas in the exercise of

police power within the limits of a town involves municipal functions. Regulation of oil and gas operations outside the town's limits does not.

The regulation of oil and gas has been held to be a matter of exclusively statewide concern. Oborne v. Board of County Commissioners, 764 P.2d 397 (Colo. App. 1988), cert. denied 778 P.2d 1370 (Colo. 1989). This designation, however, does not necessarily imply that oil and gas regulation does not involve some municipal functions. Some aspects of oil and gas regulation inescapably involve municipal regulatory functions, whether they are performed at the town, county or state level. Denver & Rio Grande Western R. Co. v. City and County of Denver, 673 P.2d 354 (Colo. 1983). ²

Land use control is an example of the distribution of a regulatory power to and among the several levels of government. Land use is regulated by the state Land Use Commission as well as by zoning at the county and municipal level. See Oborne v. Board of County Commissioners, 764 P.2d 397 (Colo. App. 1988). A significant degree of local control

² The additional burden placed on oil and gas operations by allowing regulation by a municipality within its limits is minimal, especially compared to the threat to its safety, order, comfort and convenience. For example, the benefit to the town of preventing the drilling of an oil well in a school yard is unlikely to be outweighed by the burden of requiring the drilling to be done from another location. Moreover, angle drilling techniques permit some variation in placement of the surface equipment for exploiting a particular resource; the drill can often be located in any of several places. The location of a school yard cannot so easily be moved.

is exercised over local land use issues. To the extent of this control, land use determinations represent the performance of municipal functions. Land use control has been held to represent a "matter of local concern." See National Advertising Company v. Department of Highways, 751 P.2d 632, 635 (Colo. 1988). Local government land use control is also included in a statutory designation as a "municipal function." C.R.S. Sec. 29-20-101. ³ See also 6A McQuillin, Municipal Corporations, Sec. 24.12 (3d ed. 1988); 7A McQuillin, Municipal Corporations, Sec. 24.324 (3d ed. 1989); C.R.S. Sec. 31-23-301. Similarly, aspects of oil and gas regulation which affect a municipality constitute municipal functions.

Regulation by a municipality is effected by application of its police power: "It is well settled that a municipal regulation, having a fair relation to the protection of human life and the protection of public convenience and welfare, constitutes a reasonable application of the police power." U.S. Disposal Systems v. City of Northglenn, 193 Colo. 277, 567 P.2d 365, 367 (Colo. 1977). See City and County of Denver v. Thrailkill, 125 Colo. 488, 244 P.2d 1074 (Colo. 1952)(taxicab regulation). "The taxicab business is

³ In the case of land use, the statute defers to other controls, if they exist. To the extent some other control mechanism sought to delegate municipal functions to a special commission, however, its action would be unconstitutional.

unquestionably subject to reasonable regulation in the proper exercise of the police power." 244 P.2d at 1077. One of the most frequently used methods by municipal corporations for exercise of their powers of regulation is to require permits to be obtained. Id. This is part of what Frederick's Ordinance No. 152 requires.

Oil and gas regulation has been held to be a matter of exclusively statewide concern, and the Commission held to have exclusive jurisdiction over the conduct of drilling operations. Oborne, 764 P.2d 397. In that case, the Court of Appeals affirmed the District Court's holding that Douglas County was powerless to deny a permit based on the "conditions and requirements outlined by it because none of them related to proper land use considerations, but rather all involved matters pertaining to the conduct of drilling operations over which the Commission has exclusive jurisdiction." 764 P.2d at 399. The court thus left open the possibility that denial of a permit might be lawful if it were related to "proper land use considerations." The court in Bowen/Edwards Associates, Inc. v. Board of County Commissioners, ___ P.2d ___, XIV Brief Times Reporter 879 (Colo. App. 1990), however, rejected the distinction between regulation of drilling operation and regulation of impact on land use for oil and gas development, holding that the General Assembly had preempted the entire field of oil and gas regulation. Neither Oborne nor Bowen/Edwards, however, considered whether the delegation of power to the Commission

was constitutional.

In Denver & Rio Grande Western, 673 P.2d 354, the court held that "the construction of and apportionment of costs for viaducts is not such a subject as was intended to fall within the domain of local self-government, and that therefore article V, section 35 does not prohibit the PUC's exercise of powers granted it under [the statute]." 673 P.2d at 362. This case involved a single, massive and expensive project whose very construction would have a substantial and lasting effect far beyond the municipal boundaries of Denver. It involved two major interstate transportation systems at a location with particular importance to the operation of each. Oil and gas as an industry also has a far-reaching and extensive involvement in the economic and political affairs of the state and nation. Regulating the oil and gas industry is properly a matter of state or national concern. But to regulate a given well inside a town's boundaries is not to regulate the industry. The ordinance's effect bears more nearly the same relation to the oil and gas industry as a town's regulation of residential zoning has to the housing industry. The existence of a given well does not have the significance to the state that a major viaduct over a major railroad yard has. Regulation of the drilling and operation of that well has even less significance to the state. Denver & Rio Grande Western was a case concerning a large public construction project and the apportionment of costs

therefor. The case did not involve municipal functions. The court held that "the construction of and apportionment of costs for viaducts is not such a subject as was intended to fall within the domain of local self-government...." City of Loveland, 580 P.2d at 384. Reasonable regulation of some aspects of oil and gas operations in a town involves municipal functions.

Article V, section 35 of the Colorado Constitution applies by its terms to "municipal functions." A municipal function can, in principle, be performed at any level of government. It is the nature of the activity involved, not the level at which it is to be executed or performed, which is the provision's focus. If it were otherwise impossible for a municipal function to be performed by a state-level agency, article V, section 35 would be superfluous. Accordingly, "in modern usage the scope of the term "municipal" is to be determined by reference to the particular function to be performed rather than by strict adherence to the classification of the governmental entity performing that function...." City of Durango v. Durango Transportation, Inc., 807 P.2d 1152 (Colo. 1991). Thus, a county engaged in local services is performing "municipal functions." Id.

The state's preemption may make a local regulation unenforceable, but it does not extinguish the municipal

interest. See, e.g., National Advertising Company v. Department of Highways, 751 P.2d 632 (Colo. 1988); Denver & Rio Grande Western, 673 P.2d 354. The state has a legitimate interest in matters such as land use, National Advertising Company, 751 P.2d 632 (Colo. 1988); trash collecting, City of Thornton v. Public Utilities Commission, 157 Colo. 188, 402 P.2d 194 (1965), and the orderly conduct of citizens, Haupt v. Town of Milliken, 128 Colo. 147. 260 P.2d 735 (1953), which are commonly the province of municipal regulation and inevitably fall within the domain of local self-government. The legitimacy of the state's interest, and even the state's power to preempt in a given area does not make the function any less municipal. This is true regardless of the level of government involved in the regulatory scheme, Durango, 807 P.2d 1152, and is especially true where the state interest is restricted by the constitution. See, e.g., City and County of Denver v. State, 788 P.2d 764 (Colo. 1990).

In analyzing whether a given ordinance does or does not accomplish a municipal function, it is not necessary to decide as a preliminary matter whether the state or local interest predominates, or whether the state has preemptive power. For the purposes of article V, section 35, the focus of the analysis is appropriately placed on the function to be performed rather than on the level of government responsible or its relative power.

2. The Colorado Oil and Gas Conservation Commission is a "special commission".

""[S]pecial commission' refers to some body or association of individuals separate and distinct from the ... government; that is created for different purposes, or else created for some individual or limited object not connected with the general administration of [government] affairs." Milheim v. Moffat Tunnel Improvement District, 72 Colo. 268, 211 P. 649, 655 (1922). See City and County of Denver v. Eggert, 647 P.2d 216, 227 (Colo. 1982).

Under this definition, the court held that the Moffat Tunnel Improvement District was not a special commission. Milheim, 211 P. 649. A police department is not a special commission, nor is a city's board of public works, In re Senate Bill, 12 Colo. 188, 193, 21 P. 481, 482-83 (1889) (Elliott, J., concurring), aff'd 262 U.S. 710 (1923); nor the Pueblo Conservancy District, Keyes ex rel. Setters v. Lee, 72 Colo. 598, 213 P. 583 (1923), nor a board of county commissioners, City and County of Denver v. Eggert, 467 P.2d 216 (Colo. 1982). By contrast, the Public Utilities Commission has been held to be a special commission for the purposes of article V, section 35. See, e.g., City of Durango v. Durango Transportation, Inc., 807 P.2d 1152 (Colo.

1991). ⁴ Under the test as articulated in In re Senate Bill, and as applied since, the Oil & Gas Conservation Commission is a "special commission." ⁵

3. The General Assembly may not delegate power to perform any municipal function whatever.

"The framers of the constitution had in mind the possibility that the Legislature might attempt to create some special body to interfere with the management of municipal affairs, and wisely made provision to prevent such action."

Town of Holyoke v. Smith, 226 P. 158, 161 (Colo. 1924).

In Holyoke, the court "stated that the intention of the framers of the constitution had been to prevent legislative interference in "municipal matters," which "properly fall within the domain of local self-government." City of Loveland v. Public Utilities Comm'n, 580 P.2d 381, 384 (Colo. 1978). "By force of this [constitutional provision,] the legislature could not, by any law, vest in the Public Utilities Commission or any agency with like powers and duties jurisdiction to interfere with municipal improvements

⁴ See Anema v. Transit Construction Authority, 788 P.2d 1261, 1264 (Colo. 1990) (governing bodies of municipal or quasi-municipal corporations are not "special commissions"). The Oil and Gas Conservation Commission is not a municipal or quasi-municipal corporation.

⁵ In Holyoke, the court observed that the provision is not limited by the term "special commission" and the constitutional provision applied as well to general commissions. 226 P. at 160.

such as the water and sewage facilities acquired by Thornton." City of Thornton v. Public Utilities Commission, 402 P.2d 194, 197 (Colo. 1965).⁶

Article XX of the Colorado Constitution is a direct allocation of power. Article XX confers upon home rule cities "all the power that could be acquired by anyone to govern with relation to their local and municipal affairs. Only by constitutional amendment could this allocation of power be changed." Four-County Metropolitan Capital Improvement District v. Board of County Commissioners, 369 P.2d 67, 72 (Colo. 1962) (emphasis in original). Article V, section 35 is also an allocation of power. It operates indirectly. It does not deprive the General Assembly of power to act. Instead, it forces the General Assembly, in those situations where local governing authority is to be overcome, to act personally, using the full dignity of representative legislation.

"When the people by constitutional provision have lodged exclusive power in an political subdivision of government such as a home rule city, that power may be exercised only by the entity to which it was granted, and the home rule city cannot delegate the power elsewhere. Neither can the General Assembly

⁶ The General Assembly may delegate fact determinations. See Bettcher v. State, 140 Colo. 428, 344 P.2d 969 (1959). Determination of facts, however, is not an activity that has a municipal or a state character. It is the power to act or control which gives an act its identity as a municipal or state function.

re-invest itself with any portion of the authority it lost to home rule cities upon the adoption of Article XX by the people. Only direct action of the people can restore to the General Assembly any portion of the exclusive right of home rule cities to govern themselves in matters of local and municipal concern.

Four-County, 369 P.2d at 72. The power to perform municipal functions may similarly only be exercised by the entity to which it was granted. The General Assembly may not divest itself of this responsibility.

Characterization of the case at bar as a dispute between local regulation and state preemption risks ignoring the most important feature of article V, section 35: The question is not whether the state has the power to act directly but whether it may delegate this power. Town of Holyoke v. Smith, 75 Colo. 286, 226 P. 158, 161 (1924). The constitutional provision does not control the extent to which the General Assembly may preempt a field. It does, however, control how that preemption is to be accomplished. The essence of article V, section 35 is to assure a certain level of representation during the deliberations respecting municipal functions. Its method is to mandate that certain assertions of power by the state, specifically in circumstances in which the General Assembly would take back power it has granted, have the direct participation of the elected body. An act of legislation is "passed with all the forms and solemnities requisite to give it the force of law...." Milheim v. Moffat Tunnel District, 72 Colo. 268,

273, 211 P. 649, 651 (1922). The constitutional provision makes the usurpation of municipal functions a very serious matter and establishes that this is something which requires the full, undivided and personal attention of the General Assembly. The regulations which absorb municipal functions are not to be imposed by a bureaucracy which is only indirectly responsible to the electorate. Instead, in an essential distribution of power, this task is reserved to those who answer to the people at the ballot box. To permit the Commission to control municipal functions is to deprive the people of this measure of constitutional protection, and to reallocate the constitutional distribution of power. To hold otherwise changes the balance of powers established in the constitution, because it deletes the requirement of an affirmative act of the legislature each time a municipal function is to be overridden. That balance is the core and real purpose of article V, section 35. To change that balance, to permit this delegation, is effectively to read this section out of the constitution.

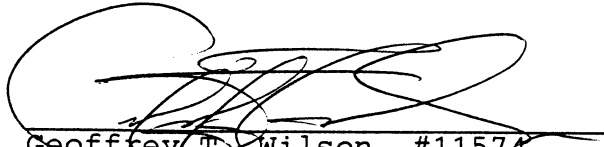
Bowen/Edwards, ____ P.2d ____, XIV Brief Times Reporter 879 (Colo. App. 1990) as well as Voss v. Lundvall Brothers, No. 91 SC 169, 89 CA 1282 (Colo. App. 1991), is now before the court. The issue in these cases is whether the legislature has the power to preempt oil and gas regulation to the exclusion of local regulation. That is not the issue here. This case involves not the power of the General

Assembly to regulate in a particular area, but its power to delegate regulation to the extent such regulation encompasses municipal functions. Police power is not limited to municipalities, but is exercised at all levels of government. Similarly, regulation exists at all levels of government. At the same time, some aspects of regulation are quintessentially municipal functions and it is with respect to these that the General Assembly itself, not a special commission, must speak.

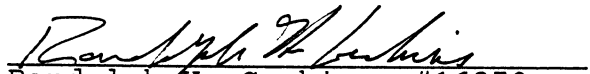
CONCLUSION

To the extent that oil and gas regulation includes municipal functions, any delegation to the Oil and Gas Conservation Commission is unconstitutional and disrupts the constitutional balance of power. Municipal ordinances which accomplish municipal functions cannot be invalidated by rules and regulations of this special commission. Ordinance No. 152 of the Town of Frederick should be held valid and enforceable.

Respectfully submitted this 25th day of March, 1992.



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